Supreme Court, U.S.
FILED
NOV 15 1993
OFFICE OF THE CLERK

No. 93-764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MIDWEST MARINE CONTRACTOR, INC.,
Petitioner,

v.

JAMES P. RUFOLO and SERVICE WELDING & SHIPBUILDING, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented herein—like that presented in *Boca Grande Club, Inc. v. Florida Power & Light Co.*, No. 93-108 (*cert. granted* September 28, 1993)—concerns the appropriate federal maritime contribution rule to apply between joint tortfeasors, when one has settled with the plaintiff; in view of the federal maritime goals of achieving a more equal distribution of justice and promoting seaman safety, should this Supreme Court adopt as the federal rule to be applied nationwide:

1) the rule allowing an action for contribution against a settling tortfeasor by a non-settling tortfeasor that has paid more than its equitable share of plaintiff's damages, as exemplified by the 11th Circuit decision in *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir.), *cert. granted sub nom., Boca Grande Club, Inc. v. Florida Power & Light Co.*, 62 U.S.L.W. 3208 (U.S. Sept. 28, 1993) (No. 93-108), or

2) the rule reducing the claim of the plaintiff by the pro-rata share of a settling tortfeasor's liability for damages, as exemplified by the 8th Circuit decision in *Associated Elec. Coop. v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991), or

3) the rule imposing a bar to contribution claims against the settling tortfeasor in conjunction with a requirement that the settlement be in good faith, as exemplified by the 7th Circuit decision in *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593 (7th Cir. Sept. 29, 1993).

LIST OF PARTIES

The parties to the proceedings sought to be reviewed are petitioner, Midwest Marine Contractor, Inc.; respondent, James P. Rufolo; and respondent, Service Welding & Shipbuilding, Inc. Petitioner, Midwest Marine Contractor, Inc., is a privately held company. Petitioner Midwest Marine Contractor, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Midwest Marine Contractor, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on September 29, 1993.

OPINIONS BELOW

The majority opinion of the Court of Appeals, the concurring opinion of Judge Eisele and the court's judgment are reproduced in the Appendix at App. 1-23. The order of the district court dismissing petitioner's cross-claim for contribution and the oral rulings made by the district court upon dismissing that cross-claim are reproduced in

the Appendix at App. 25-35. The December 11, 1991 district court final judgment, which made appealable the November 5, 1991 dismissal order, is reproduced in the Appendix at App. 36.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on September 29, 1993. This petition for writ of certiorari has been filed within 90 days of the entry of said opinion and judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

"The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . ." U.S. Const. Art. III, § 2, cl. 1.

STATEMENT OF THE CASE

A. District Court Jurisdiction

This case was brought under the Merchant Marine Act, approved June 5, 1920, ch. 250, § 33, 41 Stat. 1007, known as "The Jones Act," Title 46 U.S.C. § 688, by Respondent, James Rufolo (hereinafter, "Rufolo"). Rufolo also sought relief under general maritime law. Admiralty and maritime jurisdiction were based upon Title 28 U.S.C. § 1333(1). The district court had federal question jurisdiction over The Jones Act claim under 28 U.S.C. § 1331. The district court possessed supplemental jurisdiction over petitioner's cross-complaint for contribution against respondent, Service Welding & Shipbuilding, Inc. (hereinafter "Service Welding") pursuant to 28 U.S.C. § 1367(a).

B. Jurisdiction of Court of Appeals

Petitioner appealed the order dismissing its cross-complaint for contribution upon entry of final judgment in favor of Rufolo. The district court did not certify the order dismissing the cross-complaint pursuant to Fed. R. Civ. P. 54(b), and consequently the order was timely appealed following the entry of final judgment and denial of a timely post-trial motion, pursuant to Title 28 U.S.C. § 1291.

C. Statement of Facts

Rufolo was injured while working on a vessel, *M/V Shoreline II*, which petitioner operated. The *M/V Shoreline II* is a self-propelled jack-up barge which is used as a portable rig to transport workers to perform underwater operations. The barge has legs, called spuds, which can be hydraulically raised or lowered to allow or prevent movement.

Prior to the occurrence, the *M/V Shoreline II* was vandalized. Service Welding was engaged to repair the vessel. Rufolo testified that the vessel "looked like a mess" after Service Welding's alleged repairs; also that the vessel was in a state of disrepair after Service Welding's repairs, specifically noting the "problems with the hydraulics." (T. of 12/6/91, pp. 306-10)

On June 2, 1989, one of the starboard-side hydraulic pipes burst, spraying hydraulic fluid over most of the deck's surface and stairs. Rufolo injured himself while descending some stairs that were covered with hydraulic fluid. (Record Item 106, p. 7; T. of 12/9/91, p. 435) Rufolo sued petitioner claiming the vessel was unseaworthy, and also claiming damages under The Jones Act. Rufolo charged, in part, that the safety grid was missing on the second step of the stairs from which he fell.

Rufolo also sued Service Welding, claiming it was negligent in repairing the hydraulic jacks, specifically alleging that: Service Welding was hired to make repairs to the vessel's hydraulic jacks; Service Welding negligently repaired the hydraulic jacks; as a direct result of Service Welding's negligence, hydraulic fluid escaped from the jack's line covering the main deck and spreading into the area where plaintiff fell. (Record Item 1, pp. 5-6)

Petitioner sought contribution from Service Welding.

Thereafter, Rufolo retained a hydraulics expert to explain why the hydraulic pipe burst, leading to his accident and injury. (T. of 12/6/91, pp. 241-55, 274-75) This expert, Louis Licastro, criticized Service Welding's repairs for the deficiencies in the vessel's hydraulic pipe system:

Q. So you have two criticisms of the pipe that Service Welding put in: 1) it was not the right schedule; it was too weak or not strong enough, correct?

A. Yes.

* * *

Q. Also, I guess there should have been a bracket put on—

A. Yes.

Q. —to hold it?

A. Yes.

* * *

Q. Right. But there wasn't a bracket on that pipe?

A. That's correct.

Q. So that would be another criticism you would have of the repair done by Service Welding?

A. Yes, it would. (*Id.*, pp. 274-75)

Prior to trial, Rufolo and Service Welding agreed to settle for $1,000. A week earlier, Rufolo had demanded $700,000 to $900,000, specifically noting Service Welding's "heinous" conduct. (App. 34)

The settlement was contingent upon the dismissal of petitioner's cross-complaint for contribution against Service Welding. Over petitioner's objections, the district court approved the settlement and dismissed petitioner's cross-complaint for contribution. (App. 25-26, 27-35)

The case proceeded against petitioner alone, and Rufolo recovered a judgment against petitioner in the amount of $251,250.00. (App. 36)

REASONS FOR ALLOWING THE WRIT

CERTIORARI SHOULD BE GRANTED TO ESTABLISH THE APPROPRIATE FEDERAL MARITIME CONTRIBUTION RULE TO APPLY BETWEEN JOINT TORTFEASORS WHEN ONE TORTFEASOR HAS SETTLED WITH THE PLAINTIFF. THIS COURT SHOULD ALLOW CONTRIBUTION EVEN AGAINST A SETTLING TORTFEASOR. ALTERNATIVELY, THIS COURT SHOULD ADOPT THE CLAIM-REDUCTION RULE.

A. This Case Is Important And Mandates Review And A Decision By This Court Because This Court Has Already Granted Certiorari In Two Other Cases Raising Virtually Identical Issues.

Rule 10.1(c) of this Supreme Court's rules describing the considerations governing review on writ of certiorari provides in pertinent part:

> .1 . . . . A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered:
>
> * * *
>
> (c) When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . . .

This case meets this criterion because this Court has recently granted certiorari in two other cases raising virtually identical issues as this appeal.

Boca Grande Club, Inc. v. Polackwich, 990 F.2d 606 (11th Cir.), *cert. granted sub nom., Boca Grande Club, Inc. v. Florida Power & Light Co.*, 62 U.S.L.W. 3208 (U.S. Sept. 28, 1993) (No. 93-180) raises the identical issue presented by this appeal: whether a tortfeasor is precluded, under federal maritime law, from seeking contribution from a joint tortfeasor who has settled with the plaintiff.

McDermott, Inc. v. Clyde Iron, 979 F.2d 1068 (5th Cir. 1992), *cert. granted sub nom., McDermott, Inc. v. AmClyde*, 61 U.S.L.W. 3868 (U.S. June 28, 1993) (No. 92-1479), while not directly involving a contribution action, does necessarily concern the propriety of applying the "claim-reduction rule"—a rule which the Seventh Circuit herein rejected as the rule to apply between joint tortfeasors when one has settled with the plaintiff.

The effect on this present appeal of this Court's action in granting certiorari in *Boca Grande Club* and *McDermott* has been addressed by Stern, Gressman, and Shapiro in their treatise on Supreme Court practice:

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari had been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument, or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, *Supreme Court Practice* sec. 4.16, p. 221 (6th ed. 1986).

For these reasons, this case meets the criterion of Rule 10.1(c), and petitioner requests that certiorari be granted.

B. This Court Should Adopt The Rule Allowing Contribution Even Against A Settling Tortfeasor Because This Rule Is Entirely Consistent With Federal Maritime Policies.

There are three methods for dealing with contribution against settling tortfeasors:

1) allowing an action for contribution against a settling tortfeasor by a non-settling tortfeasor that has paid more than its equitable share of plaintiff's damages. *See, e.g., Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, 113 S.Ct. 484 (1992) (hereinafter, "*Great Lakes*");

2) reducing the claim of the plaintiff by the pro-rata share of a settling tortfeasor's liability for damages. *See, e.g., Associated Elec. Coop. v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991); and

3) imposing a bar to contribution claims against the settling tortfeasor in conjunction with a requirement that the settlement be in "good faith." *See, e.g., Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593 (7th Cir. Sept. 29, 1993).

The first approach should be adopted because it is entirely consistent with the federal maritime policies expressed in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), and *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

Cooper reaffirmed the general intent of maritime law that one joint tortfeasor is entitled to contribution from another tortfeasor. In articulating this conclusion, this Court identified the core principles underlying maritime

contribution as (1) a more equal distribution of justice and (2) safety. 417 U.S. at 110-11.

Reliable Transfer focused on the principle of "a more equal distribution of justice," rejecting the equally divided damages rule in favor of a rule apportioning damages in relationship to a person's degree of causative fault. 421 U.S. at 410-11. An "ancient form of rough justice" with its propensity to produce "palpably unfair results" was restructured in *Reliable Transfer* with a view toward enhancing the fundamental fairness of the final judicial result by making each party bear the burden of their own proportionate degree of fault. *Id.* at 403-07.

Finally, as the Eleventh Circuit recognized in *Great Lakes*, allowing an action for contribution is entirely consistent with *Edmonds*:

> Allowing an action for contribution is also consistent with *Edmonds*. The injured party is assured of full compensation for his damages (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution. (957 F.2d at 1582)

C. The Adoption Of The "Claim-Reduction Rule" Represents The Next Best Alternative To The Rule Allowing Contribution Because The Claim-Reduction Rule Is Also Consistent With Most Maritime Policies.

Should this Court decide not to adopt the Eleventh Circuit's contribution rule, the "claim-reduction rule" represents the next best alternative rule to adopt. The claim-reduction rule, like the Eleventh Circuit's rule allowing contribution, is consistent with the federal maritime policies expressed in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Moreover, as the Eighth Cir-

cuit explained in *Associated Elec. Coop. v. Mid-America Transp.*, 931 F.2d 1266, 1270-71 (8th Cir. 1991), the adoption of a claim-reduction rule can be reconciled with *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979):

> Some courts, including one panel of the Fifth Circuit, have suggested that *Edmonds* overruled *Leger [v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979)] (the key case supporting the proportional fault approach) and requires this Court to apply the contribution bar approach. We disagree. In *Edmonds*, the negligent party not present at trial (the longshoreman's employer) avoided tort liability by paying statutorily required benefits, rather than by settling the longshoreman's claim. Thus, *Edmonds* does not involve the public policy considerations at issue in this case, such as the need to deter collusive settlements without deterring legitimate ones. Accordingly, we hold that *Edmonds* is not controlling. (citations omitted)

For these reasons, petitioner submits that the "claim-reduction rule" represents the next best alternative rule, should this Court reject the contribution rule announced by the Eleventh Circuit in *Great Lakes*.

One further point.

Although petitioner did not request claim-reduction instructions at the trial of this cause, it has not waived its right to ask this Court to grant it relief pursuant to the claim-reduction rule in this proceeding. As the majority opinion of the Seventh Circuit made clear, petitioner was not required to ask for claim-reduction instructions because the Seventh Circuit had previously rejected the claim-reduction rule as a method for dealing with contribution against a settling tortfeasor:

> Midwest Marine should not have been required to submit a jury instruction based on claim-reduction guidelines because claim reduction is not the law of this circuit and could not be under our decision in *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1318 (1992). (*Rufolo v. Midwest Marine Contractor, Inc., supra*, App. 2, n.1)

Should this Court adopt the claim-reduction rule, petitioner would request this Court to remand this cause for the limited purpose of deciding Service Welding's percentage of fault to be deducted from Rufolo's $251,250.00 judgment.

D. The Settlement Bar Rule Is The Least Consistent With These Federal Maritime Policies, And Must Be Rejected *In Toto*.

The settlement bar rule adopted by the Seventh Circuit herein must be rejected because it is inconsistent with federal maritime policies.

First, it violates the principle of "a more equal distribution of justice," by making it possible for a non-settling tortfeasor, such as petitioner herein, to bear a disproportionately greater amount of damages. This is the fatal flaw with a settlement bar rule:

> [A settlement bar] would be contrary to the spirit of contribution, since it would allow guiltier defendants to get off cheaply by settling first. The consequences of the race to settle to the losers of the race are among the reasons for finding the old common law rule of no contribution objectionable. (*Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985))

The goals of safety in deterring negligence are also frustrated by a settlement bar rule. If maritime defendants can avoid the true measure of their liability by mak-

ing quick and cheap settlements, such as Service Welding did herein, the deterrent effect of comparative fault will be negated. On the other hand, if maritime tortfeasors are required to bear responsibility for the portion of the damages caused by their own negligence, an efficient level of deterrence against future negligence is assured. *See Great Lakes*, 957 F.2d at 1582.

Finally a settlement bar rule frustrates, rather than promotes, fair settlements. *Reliable Transfer* makes the point. Defendant there argued that the apportionment of fault doctrine would frustrate settlements. In rejecting this argument, this Court noted that "a rule of fairness in court will produce fair out-of-court settlements." 421 U.S. at 408. This Court further observed:

> [The defendant's argument] . . . could hardly be accepted . . . [f]or, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable settlements. . . . (*Id.*, 421 U.S. at 408)

This case points up the need for rejecting the settlement bar rule and allowing contribution or claim-reduction. Service Welding's settlement for $1,000 was less than 1% of the amount of damages assessed against petitioner. That settlement did not promote the equal distribution of justice where Service Welding bore a substantial portion of the fault in negligently repairing the hydraulic jacks aboard the vessel. In order to promote maritime policy, contribution or claim-reduction must be allowed and a settlement bar rule rejected.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JAMES P. RUFOLO,

Plaintiff-Appellee,

v.

MIDWEST MARINE CONTRACTOR, INCORPORATED,

Defendant-Counter Plaintiff-Appellant,

and

SERVICE WELDING & SHIPBUILDING, INCORPORATED,

Defendant-Counter Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 89 C 7979—**George M. Marovich**, *Judge*, and **Allen Sharp**, *Chief Judge* (Visiting).

ARGUED APRIL 30, 1993—DECIDED SEPTEMBER 29, 1993

Before CUMMINGS and MANION, *Circuit Judges*, and EISELE, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* This case was brought under the Jones Act, 46 U.S.C. § 688, and general maritime law. The plaintiff, James Rufolo, a shipping pilot, slipped

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* The Honorable Garnett Thomas Eisele, Senior District Judge for the Eastern District of Arkansas, is sitting by designation.

and fell and hurt his back on the oil-slicked stairway of a barge called the M/V Shoreline II. Rufolo sued Midwest Marine Contractor, Inc., the barge's charterer, and Service Welding & Shipbuilding, Inc., a firm whose arguably negligent repair work on the vessel may have caused oil to collect on the stairs. Midwest Marine brought a cross-claim against Service Welding for indemnification and contribution. A jury found that the M/V Shoreline II was unseaworthy and that Midwest Marine was negligent. It awarded Rufolo $375,000, which was reduced to $251,000 because the plaintiff was found to have been 33 percent negligent. Before trial, though, Rufolo and Service Welding agreed to settle for $1,000. The district judge held that this settlement excused the ship repair outfit from liability; Midwest Marine of course disagrees. Last year in *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), we were able to avoid deciding under federal maritime law what effect the settlement of one defendant has on another. Able to escape this question no longer, we opt for a settlement-bar rule.[1] This means that in a maritime case, a settling party is excused from liability for contribution if the settlement is in good faith. Midwest Marine claims that Service Welding's $1,000 settle-

[1] The concurring opinion suggests that we could avoid deciding this question because under Rule 51 of the Federal Rules of Civil Procedure, Midwest Marine waived any objection concerning its liability by failing to submit a jury instruction about the settlement with Service Welding, despite an invitation by the district judge to do so. However, Rule 51 says merely that one may not object to a jury instruction if one has not submitted an alternative. Midwest Marine does not object to any jury instruction; therefore, Rule 51 is inapplicable. To find waiver in these circumstances would mean that a party must invite error. Midwest Marine should not have been required to submit a jury instruction based on claim reduction guidelines because claim reduction is not the law of this circuit and could not be under our decision in *Matter of Oil Spill By The Amoco Cadiz*, 954 F.2d 1279, 1318 (1992). If the district judge had accepted such an instruction as the concurrence says Midwest Marine should have submitted, we would now be reversing that decision for error.

ment with Rufolo was not in good faith, but the district judge disagreed, as do we.

Rufolo was a seaman pilot working for Midwest Marine out of Chicago, primarily on Lake Michigan aboard the M/V Shoreline II, a self-propelled jack-up barge. The barge's most distinctive feature is legs, or spuds as they are called, which can be lowered by hydraulics and attached to the bottom of the lake, and then lifted again when the barge is in motion. The barge is used to take crew members out to sea so that divers can work under water. In September 1988 the M/V Shoreline II was partially capsized because of vandalism. Service Welding was hired to repair the hydraulic jacks on the spuds. Midwest Marine later engaged Modern Fluid Technology, Inc. to replace the vessel's hydraulic pump. Modern Fluid recommended that additional work be done on the hydraulics, but Midwest Marine declined. The barge was in a state of great disrepair at this time: the engine batteries were dead, part of a starboard spud had fallen off, hydraulic fluid leaked constantly from the legs. In Rufolo's words, the vessel was a "mess," but Midwest Marine continued to operate it. On the day of the accident, June 2, 1989, the M/V Shoreline II plied the waters from Kenosha, Wisconsin, to Evanston, Illinois.

Off the Evanston coast, Captain Paul Rufolo (the plaintiff's father) raised the M/V Shoreline II out of the water despite the missing foot on the starboard spud. The captain then returned to shore and left his son in charge. Later in the afternoon the younger Rufolo decided to raise the barge another couple of feet notwithstanding the constant hydraulic leak in the rear leg. At some point during this operation a hydraulic pipe on the deck burst and spewed twenty-five to thirty gallons of oil across the deck. Rufolo and two deckhands tried to clean up the spill, which left hydraulic fluid at least two or three inches deep at the entrance to the engine room. After a time they ran out of cleaning materials and Rufolo decided not to call the Coast Guard for more supplies because "[i]t's a lot

of problems when you involve the Coast Guard in a little minor clean-up" (transcript of Dec. 9, 1991 at 424). The men went to the galley to watch television and eat dinner. Rufolo was later beckoned by a crew member to help start one of the engines. But on his way down the still-treacherous stairs to the engine room, where the safety grid on the second step from the top was missing, Rufolo in his oil-soaked shoes slipped and fell and sustained the injuries that gave rise to this suit. In his trial testimony, Rufolo admitted seeing the oil on the stairs—not much of an admission since the oil spill had been several inches deep and Rufolo had just spent an hour trying to clean it up. The jury sorted out the various liabilities of the parties under the Jones Act and general maritime law, and as noted found that Midwest Marine owes Rufolo $251,000; the district judge found that Service Welding, having settled with Rufolo separately, owes Midwest Marine nothing.

Midwest Marine's first argument is that it cannot be sued by the plaintiff because he owns it. Actually, he owns 10 percent of Midwest Marine's stock; his mother, father and two sisters own the rest. We assume that the reason a party sues a company of which he is part owner is because someone other than the company (usually an insurance carrier) is footing the bill. In any event, the Jones Act creates a cause of action for seamen who are injured by the negligence of owners of unseaworthy vessels. Rufolo cites a district court case from Washington state, *Strom v. M/V "Western Dawn"*, 698 F. Supp. 212, 214 (W.D. Wash. 1986), for the common-sense proposition that one must be an employee, not an owner, to have a cause of action against a ship's owners under the Jones Act. As the statute says, "Any seaman who shall suffer injury in the course of his employment may, at his election, maintain an action for damages at law * * *." 46 U.S.C. § 688(a). "The key to seaman status is employment-related connection to a vessel in navigation." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355; see also *Southwest Marine, Inc. v. Gizoni*, 112 S. Ct. 486, 490-491. The district court

held that *Strom* was not binding because it involved partnership and Washington state law.

In any event, we cannot accept Midwest Marine's contention that Rufolo was not an employee. In *Strom*, the plaintiff was an active partner who had helped design the very gate latch system that caused his injury. 698 F. Supp. at 214. Rufolo, by contrast, is merely a 10 percent shareholder in a corporation and was not shown to be active or influential in its business affairs. Of course the stockholders own the corporation. But mere ownership of some small amount of stock cannot deprive one of employment status; otherwise, the thousands of workers who have invested in the companies that employ them or received stock options as compensation would be deprived of the protections Congress intended to provide to seamen when it passed the Jones Act. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1548 (11th Cir. 1987), certiorari denied, 486 U.S. 1033.[2] In this case we have no evidence that the younger Rufolo acted in an ownership capacity other than sometimes serving as captain when the actual captain was absent. Also, whatever hand Rufolo might have played in causing his own injuries—by, for example, making bad decisions as acting captain—were taken into account by the jury when it found him 33 percent negligent.

Rufolo would have been able to collect his award from either defendant had he not settled on the eve of trial for $1,000 with Service Welding. The district court applied the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, rather than federal law, and concluded that Service Welding extinguished its liability to Midwest Marine when it settled separately with Rufolo. We agree with that result but hold that the district court should have applied federal maritime law rather than Illi-

[2] A subsequent Eleventh Circuit case, *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (1992), does not detract from this principle.

nois contribution law. *Amoco Cadiz* left open the choice of law question, 954 F.2d at 1315, but other circuits that have considered rules of contribution in admiralty cases have fashioned federal law and not relied on state law. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256; *Associated Elec. Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir. 1991); *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989); *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir. 1988), certiorari denied, 488 U.S. 981, 488 U.S. 1030; *Self*, 832 F.2d 1540 (11th Cir. 1987); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908 (1st Cir. 1987), certiorari denied, 484 U.S. 1008. The benefit of applying federal law in admiralty is uniformity. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373. Service Welding points out the obvious—not all circuits have opted for the same rules of contribution—and would have us conclude that uniformity is not served by applying federal admiralty law. But federal law promises at least the potential of uniformity should the Supreme Court decide the issue. And even a circuit split here or there gives parties eminently greater guidance and reliability than having to discern a different rule for every state. We conclude, therefore, that this case should be decided under federal, not Illinois, law.

As we explained in *Amoco Cadiz*, there are four potential rules. In a no-contribution system, all defendants are jointly and severally liable, the plaintiff may collect the entire award from any defendant, and no defendant may obtain contribution from any other. A contribution system is the same as a no-contribution system except that a defendant who pays more than his share of the apportioned fault may be reimbursed by other defendants. In a claim reduction world, defendants are also jointly and severally liable, but if the plaintiff settles with one defendant, the non-settling defendants are excused from any damages caused by the settling party. For example, if three defendants are each a third liable and one settles, the plaintiff may only collect two-thirds of the award from the non-settling parties. Finally, a settlement bar excuses a settling

defendant from all liability (that is, other defendants cannot obtain contribution from him) so long as the settlement is made in good faith. *Amoco Cadiz*, 954 F.2d at 1315. None of the approaches is a panacea, *id.* at 1318, and there is certainly no uniformity among the circuits.[3] Even the Restatement (Second) of Torts § 886A has not decided which rule to adopt. The concurrence argues in favor of the claim reduction rule, but this option complicates litigation and lowers recoveries for the injured, and in any event was expressly foreclosed by *Amoco Cadiz*. *Id.* at 1316 (quoting *Edmonds*, 443 U.S. at 268-273).

It is clear that the Supreme Court still adheres to the principle that an injured party may collect the whole amount of his award from any defendant. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397; *Edmonds*, 443 U.S. 256. As the Court noted in *Edmonds*,

> Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.

443 U.S. at 260 n.7 (quoting *The Atlas*, 93 U.S. 302, 315). But the principle enunciated in these cases—redress plaintiff's deprivation first and let the defendants fight over the scraps later—offers no guidance about how to treat settling parties since each contribution rule already incorporates the notion that plaintiff compensation takes precedence. *Miller*, 887 F.2d at 904. We are at liberty, therefore, to choose any of these contribution systems and we opt for the settlement bar. Its advantages are obvious: parties can buy certainty. If they work out a deal sufficiently appealing to the plaintiff, defendants can evade the hazards of trial and the pitfalls of post-trial contribution.

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[3] See *Amoco Cadiz* for the status of each rule in the various circuits. 954 F.2d at 1315-1318.

There is thus a huge incentive to settle cases. We are mindful that courts should not shirk their duty to decide genuine cases and controversies by tipping the scales so heavily in favor of settling that it never pays to adjudicate, but considering how clogged the court system is and how bulging the federal reporters have become, it is appropriate to encourage parties to negotiate their own solutions. One drawback of the settlement bar is that defendants who go to trial may be saddled with an unfair share of the liability merely because they are available to sustain the jury's wrath for the defendants' collective wrongdoing. But that logic would counsel against all settlements not joined by every defendant. Also, the good faith requirement ensures that plaintiffs and settling parties do not scheme to put the onus unfairly on the remaining defendants, although having to ensure that settlements are in good faith can be a drawback if a mini-trial is required to determine the true extent of a party's liability. *Amoco Cadiz*, 954 F.2d at 1317.

But no solution is perfect, *id.* at 1318, and we think the settlement bar comes closer than the alternatives. A no-contribution system, though easy for courts to administer, creates massive distortion by saddling defendants who may be only slightly at fault with complete liability and no recourse for collecting from the other wrongdoers. The contribution alternative eliminates that problem, but it also makes settling a nearly worthless proposition because even if a defendant settles, he is still responsible for his full share of the fault. The only benefit to settling in such circumstances is to save on litigation costs, but since the settling defendant is responsible anyway, he is likely to want to participate in the trial to control how much of the wrongdoing is attributed to him. Also, the burdens of administering a contribution system—figuring out how much fault belongs with each current and former defendant—are staggering. In short, we think the settlement bar has the most advantages and the fewest drawbacks. See *Miller*, 887 F.2d at 903-907.

The settlement bar approach is also consistent with the district court's determination of these parties' liabilities under Illinois law. Under the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, where a joint tortfeasor reaches a good faith settlement, the claimant is released from liability for contribution to other joint tortfeasors. *Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 527 N.E.2d 1248 (1988); *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 499 N.E.2d 1373 (1986). Because Service Welding chose to settle with the plaintiff before trial, it is completely immune to the $251,000 judgment rendered against Midwest Marine—that is, so long as the settlement of $1,000 was in good faith. Midwest Marine contends that it wasn't.

The district court disagreed. It found no reason "to think that this case is being settled for anything other than what it's worth" (transcript of Nov. 1, 1991 at 11-12). Good faith equates with a bona fide estimate of liability at trial, *Amoco Cadiz*, 954 F.2d at 1315, and a district court's decision to approve a settlement will be upheld barring an abuse of discretion. *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985). The gist of Midwest Marine's argument is that, having asked for $500,000 in damages from two defendants, the plaintiff's decision to settle for $1,000 from one defendant is tantamount to bad faith. But we are unwilling to say that a disproportionately low settlement in relation to the amount of liability found at trial automatically demonstrates unsavory collusion; a low settlement may merely reflect that plaintiff has a weak case against the settling defendant. Rufolo's counsel explained the $1,000 settlement in oral argument as a matter of basic trial strategy: get rid of the weak link in your case and go head to head with one defendant rather than two. The settlement with Service Welding did not come until extensive discovery had been completed. Clearly, Rufolo had it within his power not to have sued Service Welding in the first instance. It is logical to assume, then, absent some evidence to the contrary, that the plaintiff learned in discovery that he would be bet-

ter served at trial by concentrating on Midwest Marine alone. Why? The most obvious reason to have discarded the case against Service Welding is that it only fixed the hydraulic systems on the spuds, or legs, while the oil spill that prompted Rufolo's fall down the engine room stairs came from a hydraulic pipe on the deck. Service Welding was not the only firm to work on the hydraulics either; a firm called Modern Fluid Technology replaced a hydraulic pump on the deck. Rufolo may have simply calculated that the jury would find Service Welding innocent of wrongdoing and thus dilute the case against Midwest Marine, about whom there was ample evidence of wrongdoing: ignoring Modern Fluid's suggestion that the hydraulics undergo further repairs, continuing to operate the M/V Shoreline II when its condition was so fragile, allowing oil to collect on the stairs as a matter of course, and failing to replace a missing grid on the second step. Midwest Marine sent to the witness stand an expert who tried to foist all the blame on Service Welding, but there were expert witnesses on the other side and the jury was entitled to disbelieve Midwest Marine's witness. Not only is there no evidence of bad faith in the settlement, but Midwest Marine has not suggested, and we cannot conceive of, any reason why plaintiff would have colluded with Service Welding. There is no suggestion Rufolo received information or anything else from Service Welding that benefitted him in the trial. If any party suffered from the low settlement figure, it was Rufolo, not Midwest Marine.

Midwest Marine last argues that it should be indemnified by Service Welding. In the classic indemnity case in maritime law, the owner of the ship has relinquished control of the vessel to another party whose negligence subjected the owner to liability. *Ryan Stevedoring Co. v. Pan-Atlantic Steam Corp.*, 350 U.S. 124; *Boyle v. Pool Offshore Co.*, 893 F.2d 713, 719 (5th Cir. 1990); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1167 (5th Cir. 1985); *Hobart v. Sohio Petroleum Co.*, 445 F.2d 435, 438

(5th Cir. 1971), certiorari denied, 404 U.S. 942. But Midwest Marine never relinquished control of the M/V Shoreline II and the jury plainly found that Midwest Marine bore the brunt of fault for Rufolo's accident.

To summarize, we hold that Rufolo has standing as a seaman-employee under the Jones Act to bring this suit, that the federal law of admiralty applies rather than Illinois law, that a settling defendant is excused from contribution so long as the settlement is made in good faith, and that this settlement was indeed conceived of and executed in good faith. For these reasons, the district court's decision is affirmed.

EISELE, *Senior District Judge*, concurring.

The majority states: "Last year in *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), we were able to avoid deciding under federal maritime law what effect the settlement of one defendant has on another. Able to escape this question no longer, we opt for a settlement-bar rule." I disagree. We could, and should, "escape" the contribution rule question by deciding the case on a narrow issue.

Midwest Marine has waived any objection concerning whether its liability exceeds its proportionate share of fault by failing to submit proper jury instructions. Rule 51 states in part: "No party may assign as error the giving or *failure to give* an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." This has always been the rule in federal courts. *Mill Owners Mutual Fire Insurance Co. v. Kelley*, 141 F.2d 763, 765 (8th Cir. 1944). Further, when dismissing Midwest Marine's Cross-Complaint for Contribution, the trial court stated:

> This does not in my judgment, leave [Midwest Marine] holding the bag either, because at trial you are entitled to have your liability, according to the cases, limited to your proportional fault. And I suppose that you take care of that by way of instruction to the jury at trial.

(T. of 11-1-91, P.7). Yet, despite Rule 51 and the trial court's admonitions, Midwest Marine did not submit a jury instruction or jury verdict form that would have directed the jury to apportion fault between it and Service Welding. In fact the jury verdict and special interrogatories form proposed by Midwest was submitted to the jury. The form does not provide for any allocation of fault to Service Welding. Indeed, it calls only for the apportionment of fault between the plaintiff, Rufolo and Midwest and makes it clear that the total of those percentages must equal 100%. Midwest argues, and the majority agrees, that for Midwest to submit an instruction limiting its liability to its proportionate fault or calling upon the jury to apportion fault between it and Service Welding would have been to invite error on the theory that "claim reduction is not the law of this circuit and could not be" under *Amoco*. See footnote 1 to majority opinion. But I disagree that claim reduction cannot be the law of the circuit. Indeed, in the discussion below I strongly urge the adoption of the claim reduction rule by this Circuit. Believing that Midwest has waived this issue, I concur in the result reached by the majority.

The majority arrives at the same result—excusing the settling tortfeasor, Service Welding, from contribution—by applying the settlement-bar rule. The majority justifies its adoption of the settlement-bar approach as follows:

> We are at liberty, therefore, to choose any of these contribution systems and we opt for the settlement bar. Its advantages are obvious: parties can buy certainty. If they work out a deal sufficiently appealing to the plaintiff, defendants can evade the hazards of trial and the pitfalls of post-trial contribution. There

> is thus a huge incentive to settle cases. We are mindful that courts should not shirk their duty to decide genuine cases and controversies by tipping the scales so heavily in favor of settling that it never pays to adjudicate, but considering how clogged the court system is and how bulging the federal reporters have become, it is appropriate to encourage parties to negotiate their own solutions. One drawback to the settlement bar is that defendants who go to trial may be saddled with an unfair share of the liability merely because they are available to sustain the jury's wrath for the defendants' collective wrongdoing. But that logic would counsel against all settlements not joined in by every defendant. Also, the good faith requirement ensures that plaintiffs and settling parties do not scheme to put the onus unfairly on the remaining defendants, although having to ensure that settlements are in good faith can be a drawback if a mini trial is required to determine the true extent to a party liability. *Amoco Cadiz*, 954 F.2d at 1317.

While I agree with my brothers that federal law controls the contribution rules in admiralty cases such as this, I disagree with the majority's choice of contribution rules.

The question of the appropriate federal maritime contribution rule to apply between joint tortfeasors, when one has settled with the plaintiff, has not been resolved by the United States Supreme Court. Since the Circuits are not in agreement, it is probable that the Supreme Court will eventually decide the question. In the meantime we are called upon to use our best judgment in choosing a rule which will most fairly and efficiently deal with the federal issue presented. Since the majority has reached this issue, it is my judgment that the claim reduction rule, rather than the settlement-bar rule, will more nearly meet these objectives.

The issue of how to best address the right of contribution against a settling joint tortfeasor in an admiralty action has resulted in several different approaches and con-

siderable disagreement over which is the best. Before an analysis is made of the contribution rule that should be applied, it will be helpful to review some general tort principles.

The threshold question in cases involving multiple defendants is whether the negligence of the plaintiff, if any, is to be compared to *each* defendant or against the total of *all* the defendants. The majority and better view is to compare the combined negligence of all defendants against the plaintiff's negligence. Henry Woods, *Comparative Fault* 2d ed. §13.1 (1987). At common law, once the judgment was entered against joint tortfeasors, the liability was joint and several. This concept was not initially changed by the introduction of comparative negligence. Each tortfeasor whose negligence was a proximate cause of an indivisible injury remained individually liable for all compensable damages attributable to that injury. *Id.* at §13.4 [citing Prosser, *The Law of Torts*, §47 (4th ed. 1871)]. The rule was potentially harsh for defendants because, at common law, there was no contribution among joint tortfeasors. As a result, there have been judicial and statutory initiatives to avoid the consequences of the no contribution rule. One approach has been to eliminate joint and several liability—replacing that concept with an apportionment of individual liability on the basis of each joint tortfeasor's percentage of fault. While this method is particularly fair to individual defendants, since each defendant's liability is limited to the harm he or she caused, it subjects the plaintiff to the risk of each defendant's solvency. The second inroad on the no contribution rule has been the development of various contribution formulas. An apportionment of damages among joint tortfeasors on an equitable basis has developed as a result of the growth and acceptance of comparative negligence in tort law. In fact, in admiralty actions, the rule of "no contribution" is no longer viable. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). "[A] 'more equal' distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two

wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Id.* at 110-111.

The question that remains, and the question before the Court in this case is: which of the possible contribution rules should this Circuit adopt? I agree with the majority that existing precedent, both from the Supreme Court and the Seventh Circuit, "offers no guidance about how to treat settling parties since each contribution rule already incorporates the notion that plaintiff compensation takes precedence" and "[w]e are at liberty, therefore, to choose any of these contribution systems . . . ."

At the other end of the spectrum from no contribution is the rule of full contribution. This alternative would permit a contribution claim by tortfeasor A against joint tortfeasor B notwithstanding the fact that tortfeasor B had settled with the plaintiff. This full contribution approach, however, has the distinct disadvantage of discouraging settlement. *The Matter of the Oil Spill By the Amoco Cadiz*, 954 F.2d 1279, 1317 (7th Cir. 1992). A defendant has little incentive to settle if, subsequent to his settlement, he can be held to additional liability in a contribution action by a nonsettling joint tortfeasor.

Once it is decided that neither a "no contribution" rule nor a "full contribution" rule will be followed, two additional questions must be answered. First, the Court must determine whether fault should be distributed proportionately or on an equal pro rata basis among the joint tortfeasors. Second, the Court must determine what effect a settlement and release by one tortfeasor has on the remaining tortfeasor.

In answer to the first question, the better rule is to distribute fault among tortfeasors on a proportionate fault basis rather than on an equal pro rata basis. This is true even though the 1939 and 1955 versions of the Uniform Contribution Among Tortfeasors Act provided for pro rata contribution. The equal pro rata basis simply divides the total damages by the number of tortfeasors. As a result, the percentage of harm caused by each tortfeasor is not

reflected in the distribution of liability among the tortfeasors. Such an outcome is inequitable. The early resistance to proportionate contribution is most likely explained by the prevailing negative attitude throughout the first half of this century towards any system that smacked of comparative fault. The optional provision of the 1939 Uniform Act, which permitted proportionate assessment of fault, has been uniformly approved by commentators and in recent years has received almost universal acceptance. Proportionate assessment of fault among defendants more accurately reflects the reality of wrongdoing. *See generally* Henry Woods, *Comparative Fault* 2d ed. §13.4-7 (1987). Under an allocation system based upon relative fault, the more culpable tortfeasor will bear the greater share of the loss, but a less culpable joint tortfeasor will not escape all liability (as was the case under a no contribution system) and will not overpay as he or she would under an equal pro rata contribution system.

A second question the Court must ask is whether a settlement by one tortfeasor has any effect on other joint tortfeasors. At common law, a recovery and satisfaction of a judgment against one tortfeasor discharged all the others. This rule was abrogated by the Uniform Act which stated that a release by one joint tortfeasor does not release the others unless it specifically so provides. The effect of a settlement is to release the *settling* defendant, but the effect on the plaintiff and the nonsettling defendants has remained an open question to this point. The two most frequently suggested rules to apply when one tortfeasor has settled are the "settlement bar rule" and the "claim reduction rule."

Under the settlement bar approach, assuming the settlement was made in good faith, the settling tortfeasor escapes any liability for contribution. Following settlement, the settling tortfeasor's involvement in the action ends. He is discharged. The nonsettlers receive credit for the dollar amount paid by the settlers. Thus, the plaintiff may recover the entire amount of the judgment, less the amount that the plaintiff had already collected from

the settling tortfeasor. Under the settlement bar approach, defendants are encouraged to settle since settlement buys peace. Plaintiffs, likewise, will negotiate settlements since there is no disincentive from their perspective. A plaintiff may collect the full amount of his damage award regardless of whether the prior settlement reflected an accurate picture of the economic harm caused by the settling tortfeasor. To some extent, this resurrects some of the problems with the "no contribution" rule by allowing the plaintiff to pick and choose with whom to settle. One defendant may be forced to pay damages far in excess of the proportionate share of harm he or she caused. The settlement bar rule encourages quick, partial settlements but potentially frustrates complete and just settlements. A plaintiff can receive some money initially by settling, all the while knowing that the remaining nonsettling tortfeasor will be responsible for the balance of any damage award. Such an environment creates the opportunity for improper deal-making and collusive settlements. To a limited extent this problem can be overcome by requiring the settlement, which extinguish the other defendants' right of contribution, to be subject to a good faith requirement. However, the monitoring and inquiry into good faith impose new burdens on the courts. Both from an administrative and practical standpoint, I respectfully disagree with the majority that "the good faith requirement ensures that plaintiffs and settling parties [will] not scheme to put the onus unfairly on the remaining defendants . . ." A mini-trial concerning the merits of the settlement will usually be required to determine whether the liability assumed by the settling tortfeasor is reasonably related to the strength of the plaintiff's claims. And there may be hidden, and difficult to ferret out, considerations in such settlement agreements which such bob-tailed "good faith" hearings are not likely to identify.

The other approach is what *Amoco Cadiz* refers to as the claim reduction rule. *Amoco Cadiz*, 954 F.2d at 1315. This rule, like the settlement bar rule, bars contribution from the settling tortfeasor. Claim reduction, however,

adopts the comparative fault approach in that it restricts the plaintiff's recovery against the nonsettling tortfeasor to that defendant's proportionate share of fault. Under this rule, the plaintiff forgoes the right to collect from nonsettling defendants any damages attributable to the settling party's share of fault. The plaintiff's total recovery consists of the amount he received from the settling tortfeasor plus the amount represented by the nonsettling tortfeasor's proportionate share of fault. The majority states that the claim reduction rule complicates litigation and lowers recoveries for the injured. I disagree. It is true that recoveries under the claim reduction rule *may* be lower. The ultimate recovery by the plaintiff under the claim reduction rule (also known as the proportionate fault rule) depends upon the settlement the plaintiff reaches with a settling defendant and whether the plaintiff settles with the deep-pocket defendant or with the less affluent defendant. If the plaintiff settles with a defendant for that defendant's proportionate degree of fault (or for more), then the claim reduction rule will not result in a lower recovery. If, however, the plaintiff settles with one defendant for less than his proportionate degree of fault, then the plaintiff's recovery will be for less than 100% of the damages since his recovery against the second defendant is limited to the second defendant's proportionate fault. Such an outcome is simply a reflection of the risk of settling.

Additionally, I would suggest that if the claim reduction rule is not followed, collusive settlements will often result. A plaintiff would seldom settle with a deep-pocket defendant. Under the settlement-bar approach the plaintiff would settle, fairly or unfairly, with the less affluent defendant, knowing that the deep-pocket defendant was available to pick up the tab. While we do not want a plaintiff's injuries to go uncompensated, the result discussed above seems abusive to the nonsettling defendant when the plaintiff settles with the first defendant for substantially less than that defendant's proportionate degree of fault. And, in my opinion, the good faith test is not an adequate protection against such abuses, the incentives for which are obvious.

The majority states:

> None of the approaches is a panacea, *id.* at 1318, and there is certainly no uniformity among the circuits. Even the Restatement (Second) of Torts §886A has not decided which rule to adopt. The only option we have on an earlier occasion ruled out is claim reduction because it complicates litigation and lowers recoveries for the injured. *Id.* at 1316 (quoting *Edmonds*, 443 U.S. at 268-273).
>
> It is clear that the Supreme Court still adheres to the principle that an injured party may collect the whole amount of his award from any defendant. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397; *Edmonds*, 443 U.S. 256. As the court noted in *Edmonds*,
>
> > Nothing is more clear than the right of the plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or anyone of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.
>
> 443 U.S. at 260 n.7 (quoting *The Atlas*, 93 U.S. 302, 315).

But does precedent rule out our adoption of the claim reduction rule? The majority acknowledges that the Circuit did not adopt the settlement bar approach in *Amoco*. In fact *Amoco* stated:

> "Whether to follow *Joia* by allowing *Amoco* contribution from ABS, or Self by adopting the settlement bar rule, is a question for another day."

And only in dicta did the panel state it would not have adopted the claim reduction approach.

If the majority reads *Edmonds* as advancing a full contribution rule, then neither the settlement bar rule nor the claim reduction rule would be available to this Court

since both recognize the effect of settlement and *prohibit the plaintiff from collecting the full damage amount from any one defendant.* Under both rules, the plaintiff's recovery from the nonsettling tortfeasors is limited or reduced by an amount that is related to the settling tortfeasor (either the amount paid by him or her in settlement under the settlement bar approach or that tortfeasor's proportionate share of fault expressed as a dollar amount under the claims reduction approach). If, however, the majority is reading *Edmonds* as allowing a settlement to reduce the amount that can be collected from a nonsettling tortfeasor, then either rule (the claim reduction rule or the settlement bar rule) is available to this Court. The latter reading is preferable since, as noted by the Eighth Circuit in *Associated Electric Co-Op v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991), *Edmonds* did not involve settlement issues and thus the language quoted therefrom by the majority is dicta. The issue in *Edmonds* involved the avoidance of tort liability by payment of statutorily required benefits, rather than a negotiated settlement of claims between the plaintiff and defendant. "Thus, *Edmonds* does not involve the public policy considerations at issue in this case, such as the need to deter collusive settlements without deterring legitimate ones." *Id.*

One criticism often levied against the claim reduction rule is that the plaintiff, by settling with one defendant, may receive less than the full compensation awarded in a final judgment since his recovery from the nonsettling defendants is reduced by the settling defendant's share of fault. That criticism only expresses one side of the equation, however. If the plaintiff recovers more money in settlement than is represented by the settler's percentage of fault as found by the jury, he has made a favorable settlement; if less, a bad settlement. Since a settlement is an agreement reached between a plaintiff and defendant concerning the amount of money owed by the defendant to the plaintiff for the harm that he has caused, it is obvious that the parties may over or under estimate the value of the plaintiff's claim. Such an agreement natural-

ly involves the tradeoff of a certain recovery in exchange for the relinquishment of a possibly more lucrative recovery at trial. Both parties must analyze the risk/return ratio of going to trial. When the plaintiff voluntarily chooses to settle, limiting the remaining nonsettling tortfeasors' liability to an amount commensurate with the degree of fault of each does not unduly burden the plaintiff. More importantly it results in the fair and just disposition of the plaintiff's claims against the non-settling joint tortfeasors. And it avoids the slippery "good faith" analysis required by the settlement-bar rule. As stated by the Eighth Circuit in *Associated Electric Co-op v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991):

> Unlike the contribution bar approach, the proportional fault approach deters collusive settlements by limiting the plaintiff's recovery against non-settling defendants to a sum accurately reflecting such defendants' negligence. Unlike AEC's preferred approach allowing contribution suits, the proportional fault approach does not discourage defendants from settling by subjecting them to the risk of contribution suits from non-settling defendants. Admittedly, the proportional fault approach creates some risk that plaintiffs might either receive double recovery from a generous settlement or be deterred from settling because a plaintiff's settlement could be offset by a reduction at trial of his or her recovery. *See Leger*, 592 F.2d at 1248-50 (rejecting non-settling defendant's concerns about double recovery); Restatement §886A comment m (expressing concern that proportional fault approach might deter settlement). Because some settlements are more favorable than others, we believe these risks balance each other out. *Cf. Leger*, 592 F.2d at 1250 n. 10 (noting that "[s]ettlement dollars may be worth more or less than judgment dollars, depending on which party received the more favorable settlement.")
>
> In sum, we hold that when the Teasleys' claims against AEC come to trial, the court should reduce "the claim that the injured party [Teasley] has against the other

> tortfeasors [AEC] by the amount of the equitable share of the obligation of the released tortfeasor [MATCO]." Restatement § 886A comment m.

Again, the claim reduction rule creates some risk for the plaintiff and a settling defendant. But no one should complain since the plaintiff and the settling defendants have resolved their differences *by agreement* and the non-settling defendants will only have to bear the proportionate loss occasioned by their own fault. See *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1250 n.10 (5th Cir. 1979).

Yes, there are positives and negatives in any solution that we might adopt. But, if the most just and fair resolution of such admiralty cases is our prime concern, then we should opt for the claim reduction rule.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: September 29, 1993

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable DANIEL A. MANION, Circuit Judge
Honorable GARNETT T. EISELE, Senior District Judge*

No. 92-1593

JAMES P. RUFOLO,

Plaintiff-Appellee

v.

MIDWEST MARINE CONTRACTOR, INCORPORATED,

Defendant-Counter Plaintiff-Appellant

and

SERVICE WELDING & SHIPBUILDING, INCORPORATED,

Defendant-Counter Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 7979—George M. Marovich, Judge.

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* The Honorable Garnett Thomas Eisele, Senior District Judge for the Eastern District of Arkansas, is sitting by designation.

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

[Dated November 5, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES P. RUFOLO, Plaintiff, -vs- MIDWEST MARINE CONTRACTOR, INC., SERVICE WELDING & SHIPBUILDING, INC., et al., Defendants.	)	No. 89 C 7979 Judge Marovich
MIDWEST MARINE CONTRACTOR, INC., Cross-Plaintiff, -vs- SERVICE WELDING & SHIPBUILDING, INC., Cross-Defendant.	)	

ORDER

THIS MATTER having come to be heard upon Plaintiff and Defendant, Service Welding's, Agreed Motion to Dismiss Plaintiff's Complaint Against Service Welding and upon Defendant, Service Welding's, Motion to Dismiss Cross-Plaintiff's Cross-Complaint and to Generally Dismiss Service Welding Pursuant to the Illinois Contribution Act (Ch. 70 ¶ 302), the Court having been duly advised in the premises herein;

IT IS HEREBY ORDERED that Plaintiff and Cross-Plaintiff's Complaints against the Defendant, Service

Welding, are dismissed with prejudice and Service Welding is generally dismissed from this matter.

DATE: Nov. 5, 1991

ENTER: /s/ George M. Marovich
Hon. Judge George Marovich

[1]* IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES P. RUFOLO, Plaintiff,	)	
-vs-	)	
	)	No. 89 C 7979
MIDWEST MARINE CONTRACTOR, INC., et al., Defendants.	)	

Chicago, Illinois, November 1, 1991, 9:00 o'clock a.m.

REPORT OF PROCEEDINGS
BEFORE
THE HONORABLE GEORGE M. MAROVICH

For the Plaintiff: ERNEST T. ROSSIELLO, Esq.

For the Defendants: JOHN FISHER, Esq.
DONALD SCHLYER, Esq.

[2] THE CLERK: 89 C 7979, James Rufolo v. Midwest Marine Contractor, Inc.

THE COURT: Good morning.

MR. ROSSIELLO: Good morning, Judge.

MR. FISHER: Good morning, your Honor. John Fisher on behalf of Midwest Marine.

* Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

MR. SCHLYER: Good morning, your Honor, Don Schlyer on behalf of Service Welding.

MR. ROSSIELLO: Ernest Rossiello for the plaintiff.

THE COURT: There has been at least a partial meeting of the minds as far as this matter is concerned; right?

MR. ROSSIELLO: Thanks to your Honor's intervention and assistance in conference the other day.

MR. SCHLYER: Your Honor, what we have here is a settlement between the plaintiff and one defendant, Service Welding & Ship Building. But there is a cross complaint for contribution from the other defendant, Midwest Marine. Our settlement agreement is dependent upon dismissal with prejudice of that cross complaint.

We filed a motion pursuant to the Illinois Contribution Act for dismissal of that cross complaint and were informed by the other defendant, Midwest Marine, that they would object on the basis that this is an admiralty jurisdiction, and maritime law would therefore supersede or [3] preempt any state law contribution act, which the Illinois Contribution Act applies.

With that in mind, your Honor, we did some quick research last evening and found two cases which we submitted to opposing counsel, which I would like to hand to the Court, which say, in effect, that there is no uniform contribution act in maritime cases, and, therefore, state law would apply.

In one case, it was the *Wheeler v. Bonnin* case—may I hand that to the Court, your Honor?

THE COURT: Sure.

MR. SCHLYER: If I may also hand a federal supplement case—

THE COURT: Thank you.

MR. SCHLYER: —entitled *Carpenter v. United States*, your Honor.

THE COURT: Thank you, sir.

MR. SCHLYER: The case of *Wheeler v. Bonnin* was cited and quoted in Am. Jurs. 2d., 57-B, Am. Jurs. 2d., Section 1643.

In *Wheeler v. Bonnin*—it was a state case, an Oregon case. It was an admiralty case. Two people died in a boat on Lake Mead. There was a contribution statute in Oregon, very similar to this one in Illinois, that said, you know, if you settle with one party, then you cannot seek contribution—the cross defendant cannot seek contribution from the other [4] party in a tort action.

In that case, the plaintiff argued—or the cross defendant argued that maritime law controls and, therefore, the state contribution action is ineffective.

Referring to Page 358 of that opinion, the Court, on Page 358, says that: "Although maritime law controls, it can be supplemented by state law." And then it goes—it talks about in the next quote from a Supreme Court case that state law must yield to the uniform maritime law when this Court finds inroads—

> "It is true that the state court must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance, all these laws and others have [5] been accepted as rules of decision in admiralty cases even, at times, when they

> conflicted with a rule of admiralty law which did not require uniformity. 'In the field of maritime contracts,' this Court has said, 'as in that of maritime torts, the National Government has left much regulatory power in the States.'
>
> "Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history."

The Court went on to note that there was no dispute that maritime law applies. And continuing on the same page, "There is no dispute that there is a general remedy of contribution available in maritime cases, including non-collision cases, to apportion liability according to fault."

Then turning to Page 359, your Honor, the Court pointed out that there is no clear federal policy on effect of settlement or covenant not to sue on the availability of remedy or contribution.

"In the absence of uniform maritime rule concerning the effect of prior settlement and relief on the right to [6] contribution by a joint tortfeasor, we see no conflict in applying Or. S. 18.4 to 55 in this case"

THE COURT: That's the Oregon statute?

MR. SCHLYER: That's the Oregon Statute, your Honor, which is very similar to Illinois, which relieves the non—the settling party from contribution actions.

And then the Court goes on to say there is no such uniform rule, as indicated by two recent federal maritime cases, and discussed prior settlement and the availability of contribution.

This case, your Honor, was then picked up by a Nevada District Court in *Carpenter v. U.S.*, a 1988 case. And that Court also, on page—

THE COURT: Leave me ask you something as we cut to the chase here.

MR. SCHLYER: Yes, your Honor.

THE COURT: And I'm not sure how much of this that you agree with or how much you don't agree with, but let me at least see if I grasp what is being told to me.

If this were a state court action involving joint tortfeasors, there was a bona fide settlement, that does away with the contribution act, then; is that correct?

MR. SCHLYER: That's correct.

MR. FISHER: Your Honor, I would interject, if it was made in good faith.

[7] THE COURT: I said—I thought I just said precisely that. If it's a settlement in good faith, it does away with the aspects of contribution that are your rightful concern. The question then arises, is there some federal law of maritime—or maritime law that supersedes this general principle that is applicable here in Illinois. And counsel seems to indicate in the cases that there is no contrary Illinois—or, excuse me, federal policy and, therefore, the law of the situs, which would be Illinois here, would apply. The cases seem to bear that out, assuming, as you correctly point out, that we had a bona fide settlement here.

That does not, in my judgment, leave you holding the bag, either, because at a trial you are entitled to have your liability, according to the cases, limited to your proportional fault. And I suppose that you take care of that by way of instruction to the jury at trial.

So I don't really see that you're being harmed by allowing Service Welding to be out of this case.

MR. ROSSIELLO: More important, an even more important reason why Service Welding should be out, under the Jones Act, the vessel, the plaintiff, Midwest Marine, they have a non-delegable duty to provide a safe place to work and a sea-worthy vessel. A non-delegable duty.

Now, what in effect this cross claim is doing, they're trying to shift their federally-established [8] non-delegable duty onto another defendant, which they cannot do.

THE COURT: Well,—

MR. ROSSIELLO: But that's all the more reason.

THE COURT: That's right. But, I mean, we have some—I hear these as arguments that will be made maybe to a person other than me on another day.

MR. ROSSIELLO: Right.

MR. SCHLYER: But you're right, your Honor. Your very statement is cited in that Oregon case where it says that the Oregon statute does not eliminate the right to remedy of contribution against a joint tortfeasor which has settled. It does not prevent the non-settling party in a maritime case from limiting its liability according to its proportional fault.

THE COURT: That was my comment and my observation.

MR. FISHER: Your Honor, there's two reasons that we were contesting the settlement claim. Number one is that our complaint not only alleges a cause of action against Service Welding based on contribution, but also for indemnification which we are entitled to under federal maritime law. Not only contribution but indemnification. And our complaint—I don't have the exact paragraph, but does in the prayer make out that Service Welding is liable for all damages. We are seeking indemnification as well as contribution.

The case that Mr. Schlyer cited, Bonnin, is an Oregon [9] state court recognizing Oregon state law. It is not a federal case.

There are several federal cases which have recognized that admiralty rules—

THE COURT: I suppose one of the things that I could do to cut through this whole argument is just sever them out even if I didn't dismiss them.

MR. FISHER: Well, your Honor,—

THE COURT: I'm trying to have a trial here go as straightforward as I know how is very frankly what I'm doing. And I think one of the things, even if I didn't dismiss them, that I can do is to sever them.

MR. FISHER: Your Honor—

THE COURT: Do you have any doubt about my authority to do that?

MR. FISHER: No, your Honor, I don't.

THE COURT: I didn't think so.

MR. FISHER: Your Honor, there's several cases—numerous cases that have recognized that admiralty rules relative to contribution between joint tortfeasors apply in maritime cases, superseding the state cases. I'm citing *Carey v. Bahama Cruise Line*, 864 F.2d 201, which I'll present to the Court.

MR. SCHLYER: Counsel, I thought you said you didn't have a copy.

[10] MR. FISHER: Your Honor, we were at a deposition until 10:30 last night, and I got back to the office early this morning and I didn't have time to make duplicate copies for everybody.

MR. SCHLYER: You said you didn't have a copy.

MR. FISHER: No. I said I have a copy of the case. I don't have an extra copy, Mr. Schlyer.

THE COURT: Indemnification doesn't come into play until somebody gets whacked with the liability in the first place; isn't that right?

MR. SCHLYER: Yes, your Honor. The federal case of *Carpenter v. United States* addresses the indemnification issue in that case as an indemnification issue. And there the Court said: The tort indemnity principles apply to maritime cases between two joint tortfeasors. The passively or secondarily negligent party may recover from the active or primarily negligent party. But it went on to say

that where the party seeking indemnification was itself guilty of acts or omissions proximately causing the party's injuries, tort indemnification is not appropriate.

And then it went on to say the United States cannot be viewed as a completely passive party. And the same way in this case, your Honor. They were the ship owners. They maintained the vessel. They are not a passive party.

THE COURT: We are talking about joint and several [11] liability here, too, aren't we? Indemnity?

MR. SCHLYER: Joint and several liability. We're talking—right. We're not talking about a passive negligent party. I mean them being a passive party and we being the active negligent party, and they're seeking indemnity from the passive party.

THE COURT: Is anybody within the next five minutes got anything more to tell me?

MR. FISHER: Your Honor, I do.

Last week we received a demand from Mr. Rossiello in the form of a letter, which I do have copies of—it's only one page—requesting a demand in the amount of $700,000 or $900,000, and I quote, "depending on how heinous it finds Service Welding's conduct." And now we have a motion for settlement in the area of $1,000.

As your Honor is aware, this is a case where a son is suing his father's business, and good faith is the issue here. This is not a settlement in good faith.

MR. SCHLYER: We are the shipyard. We have no relationship to any of these guys.

THE COURT: I understand that. I really don't, given the history of this matter and the vigor in which it has been pursued, have any reason, based on the history of this case and my own personal knowledge of Mr. Rossiello, to think that this case is being settled for anything other than what it's worth. [12] I really don't. And, therefore,

I am going to allow the motion to dismiss Service Welding out of this both as to Mr. Rossiello and as to the cross complaint. That's my ruling.

MR. SCHLYER: Thank you, your Honor.

THE COURT: And we will see whether anybody has even any need to deal with it when the smoke clears in your real battle.

MR. FISHER: Thank you, your Honor.

THE COURT: Take care, people.

MR. SCHLYER: Have a nice weekend, your Honor.

MR. ROSSIELLO: I think your Honor has taken his place as the great conciliator in this district.

THE COURT: I don't know. There's room.

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case on November 1, 1992 at 9:00 a.m.

/s/ Geraldine D. Monahan — 5-13-92
Official Court Reporter — Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

JAMES P. RUFOLO

v. Case Number 89 C 7979

MIDWEST MARINE CONTRACTOR, INC. ET AL.

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, JAMES P. RUFOLO and against defendants, MIDWEST MARINE CONTRACTORS, INC. ET AL. in the amount of $251,250.00 plus costs.

December 11, 1991
Date

H. STUART CUNNINGHAM
Clerk

/s/ Willie A. Haynes
Willie A. Haynes
(By) Deputy Clerk

DEC 16 1993
OFFICE OF THE CLERK

No. 93-764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MIDWEST MARINE CONTRACTOR, INC.,
Petitioner,

v.

JAMES P. RUFOLO and SERVICE WELDING & SHIPBUILDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT SERVICE WELDING & SHIPBUILDING, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

LIST OF PARTIES

Service Welding & Shipbuilding is an Illinois Corporation. The corporation is closely held and has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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BRIEF OF RESPONDENT SERVICE WELDING & SHIPBUILDING, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondent, Service Welding & Shipbuilding, Inc., respectfully prays that this Honorable Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed by Petitioner, Midwest Marine Contractor, Inc.

STATEMENT OF THE CASE

Statement Of Facts

James Rufolo (hereinafter "Rufolo") was employed by Midwest Marine Contractor, Inc., (hereinafter "Midwest Marine") aboard the *M/V Shoreline II*. The *M/V Shoreline II* is a self-propelled jack-up barge and is designed to raise itself above the surface of the water by hydraulically lowering its spuds, or legs, to the sea bottom. (T. of 12-6-91, page 62).

In September of 1988, the *M/V Shoreline II* was intentionally capsized. (T. of 12-6-91, page 304). Service Welding & Shipbuilding, Inc., (hereinafter "Service Welding") was engaged to make limited repairs to the vessel's spuds and hydraulic system. (Record Item 17, page 6). Service Welding completed those repairs and the vessel was returned to Midwest Marine. After its return, Midwest Marine hired Modern Fluid Technology to make additional repairs to the hydraulic system. (T. of 12-6-91, page 257).

After these repairs the hydraulic system continued to leak hydraulic fluid. Midwest Marine continued to operate the vessel, with full knowledge of the hydraulic fluid leaks, and with a large foot broken off one of the spuds. (T. of 12-5-91, pages 69-70).

On June 2, 1989, while in a state of disrepair, the vessel was raised out of the water off of the coast of Evanston, Illinois. (T. of 12-5-91, pages 67-70). While Rufolo was raising the vessel an additional two feet above the surface of the water, the starboard hydraulic pipe burst. (T. of 12-5-91, page 74). Twenty-five to thirty gallons of hydraulic fluid allegedly sprayed from the pipe, and covered the deck. (T. of 12-5-91, page 77). Rufolo was injured when he fell down the oil covered stairs leading to the engine room. (T. of 12-5-91, page 81).

Rufolo filed an action against Midwest Marine under the Jones Act and general maritime law. Rufolo also sued Service Welding, alleging it was negligent in the performance of the repairs to the hydraulic system. (Record Item 1). Midwest Marine filed a cross-claim for contribution and indemnity against Service Welding.

Shortly before trial, Rufolo settled with Service Welding for the sum of $1,000. Service Welding filed a motion to dismiss the cross-claim for contribution. (Record Item 83). The trial court found that the settlement between Rufolo and Service Welding was in good faith and dismissed Midwest Marine's Cross-Claim for Contribution. (T. of 11-1-91, pages 11-12).

The District Court held the good faith settlement between Rufolo and Service Welding barred Midwest Marine's contribution claim. The District Court also advised Midwest Marine that its liability could be limited to its proportional share of fault by a proper instruction to the jury. (T. of 11-1-91, page 7).

The case then proceeded to trial against Midwest Marine. At trial, Midwest Marine unsuccessfully attempted to establish that Service Welding was responsible for the repair of the starboard hydraulic pipe. In fact, there was *no competent evidence* introduced to show that Service Welding was responsible for the starboard hydraulic pipe or that it did in fact make repairs to that pipe. (T. of 12-6-91, pages 269-272, and 333).

Midwest Marine implied in its Petition for Writ of Certiorari that the testimony established that Service Welding was responsible for the repairs to the hydraulic pipe that burst. (Petition for Writ of Certiorari, page 4). That is an incorrect statement of the evidence. There was *no competent evidence* at trial to show that Service Welding repaired the pipe in question. Midwest Marine

relies upon a leading *question* asked of Rufolo's expert, Louis Licastro, to prove that Service Welding installed the starboard hydraulic pipe. *Id.* The leading question assumes a matter not in evidence—that Service Welding made its alleged repairs. However, there was *no evidence* Licastro knew if Service Welding repaired that pipe. In fact, *Licastro testified he did not know* if Service Welding repaired that pipe. (T. of 12-6-91, pages 269-272).

Midwest Marine's claim that "Service Welding bore a substantial portion of the fault in negligently repairing the hydraulic jacks aboard the vessel . . ." is essentially unsupported by the record. Midwest Marine failed to establish any fault on the part of Service Welding. (Petition for Writ of Certiorari, page 11).

In addition to failing to support its claim that Service Welding was the cause of Rufolo's injuries, Midwest Marine failed to submit an instruction to the jury that would have permitted the jury to assign fault for Rufolo's injuries to Service Welding. (Record Item 106).

REASON FOR DENYING THE WRIT

THIS COURT COULD AFFIRM THE DECISION OF THE COURT OF APPEALS WITHOUT ADDRESSING THE ISSUE OF WHETHER FEDERAL MARITIME LAW SHOULD BAR CONTRIBUTION CLAIMS AGAINST SETTLING JOINT-TORTFEASORS AND, THEREFORE, THIS COURT SHOULD DENY CERTIORARI.

Midwest Marine Waived Any Right It May Have To Have Its Liability Limited To Its Proportional Share Of Fault By Failing To Provide Proper Jury Instructions.

Rule 15 of the Rules of the Supreme Court of the United States expresses the general principle that this Court should not grant a petition for writ of certiorari in circum-

stances where the Court can rule on the case without addressing the issues presented. This is just such a case.

Midwest Marine is requesting that this Court grant its petition so that the Court can establish a uniform rule in admiralty regarding the right of a non-settling joint-tortfeasor to obtain contribution from a tortfeasor that has settled with the Plaintiff. Midwest Marine has asked this Court to either allow a contribution action against a settling tortfeasor, or adopt the claim-reduction rule. Under either approach, Midwest Marine would have its liability limited to its proportionate share of fault.

Had Midwest Marine submitted a jury instruction in accordance with the directions of the District Court, Midwest Marine could have obtained at trial the precise relief it is now requesting from this Court. Service Welding moved to dismiss Midwest Marine's cross-claim for contribution after Service Welding reached its settlement with Rufolo. The District Court granted the motion and dismissed the contribution claim. The District Court, however, attempted to ensure that Midwest Marine would not be liable beyond its share of fault. In granting Service Welding's motion to dismiss, the Court stated:

> This does not in my judgment, leave you holding the bag either, because at trial you are entitled to have your liability, according to the cases, limited to your proportional fault and I suppose you take care of that by way of instruction to the jury at trial.

(T. of 11-1-91, page 7).

Midwest Marine did not, however, submit an instruction to the jury that would have allowed the jury to assess fault against Service Welding and, assuming such fault was assessed, limit Midwest Marine's liability to its degree of fault. Had such an instruction been submitted Midwest Marine would have obtained its desired relief. Its

failure to do so should be deemed a waiver of its right to so limit its liability. *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987).

The majority opinion of the Seventh Circuit held that Midwest Marine did not waive any objection to its liability. (Petitioner's App. 2). The majority stated that Midwest Marine should not have been required to submit an instruction based upon claim reduction because claim reduction was not the law of the Seventh Circuit under the decision in *Matter of Oil Spill By The Amoco Cadiz*, 954 F.2d 1279, 1318 (1992). *Amoco Cadiz*, however, was not the law of the Seventh Circuit at the time this cause went to trial. The District Court dismissed the contribution claim on November 5, 1991. (Petitioner's App. 25-26). This case proceeded to trial on December 5, 1991 and the jury rendered its verdict on December 11, 1991. (Petitioner's App. 36). *Amoco Cadiz* was not decided until January 24, 1992. *At the time this cause went to trial*, there was no prohibition in the Seventh Circuit against the application of the claim reduction rule in admiralty actions. In fact, the law applicable to this action, at the time it went to trial, was the pronouncement of the District Court that claim reduction would apply. The fact that the Seventh Circuit *later* decided claim reduction was not the law does not cure Midwest Marine's prior waiver.

Senior District Judge Eisele, in his concurring opinion, in this action, pointedly stated that:

> Midwest Marine had waived any objection concerning whether its liability exceeds its proportionate share of fault by failing to submit proper jury instructions.

(Petitioner's App. 11).

Should this Court agree that Midwest Marine has indeed waived its contribution claim by failing to submit

proper jury instructions, this Court then would have no need to decide the issues presented. For that reason, this Court should deny Midwest Marine's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Service Welding & Shipbuilding, Inc., respectfully prays that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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